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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEXIA S. KYRKLUND, et al., Defendants and Appellants.	B204597 (Los Angeles County Super. Ct. No. NA072531)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed in part and reversed in part.

Kenneth H. Lewis for Defendant and Appellant Alexia S. Kyrklund.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant Gloria Y. Ramos.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

In a 15-count first amended information, the District Attorney of Los Angeles County charged defendants and appellants Alexia S. Tiraki-Kyrklund (Kyrklund) and Gloria Y. Ramos (Ramos) (defendants) with 13 counts of cruelty to an animal. (Pen. Code, § 597, subd. (b)[1].) Counts 1 through 11 each concerned a specified individual dog or cat, count 12 concerned dogs number 1 through 152, and count 13 concerned cats number 153 through 299. In count 14, the District Attorney charged Kyrklund with violating Long Beach Municipal Code section 21.32.120 by willfully and unlawfully maintaining, operating, or carrying on a prohibited use—a kennel, as defined by Long Beach Municipal Code section 21.14.1520—at 1333 Redondo Avenue. In count 15, the District Attorney charged Kyrklund with violating Long Beach Municipal Code section 8.76.010(M) by maintaining the property at 1333 Redondo Avenue in such a condition as to create a public nuisance.

The prosecution dismissed count 15. The jury found defendants guilty on counts 2, 3, and 12, and not guilty on counts 1, 4 through 9, and 11. The jury found Kyrklund guilty on count 14. The jury could not reach verdicts on counts 10 and 13, and the trial court declared a mistrial as to those counts.

At sentencing, the trial court granted the prosecution's motion to dismiss counts 10 and 13. The trial court sentenced Kyrklund to concurrent 16-month terms in state prison on counts 2 and 3, and a concurrent 180-day jail sentence on count 14. The trial court stayed imposition of sentence on count 12 under section 654. The trial court placed Ramos on formal probation for five years under various terms and conditions, including the condition that she serve 365 days in jail, as to counts 2 and 3. As with the Kyrklund's sentence, the trial court stayed imposition of sentence on count 12 under section 654. The trial court ordered defendants to pay restitution, "separately and jointly," in the amount of $94,614.12. Defendants appeal.

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[1] All statutory citations are to the Penal Code unless otherwise noted.

BACKGROUND[2]

On October 28, 2004, Long Beach Animal Control Officer Steven Peltier went to 2623 Gardenia Avenue in the City of Signal Hill to investigate the number of dogs at that location. There were two residences on the property and between 23 and 28 dogs on site. Some of the dogs appeared to be in good condition. Other dogs had open sores on their ears of a type commonly caused by fly bites. One dog had a hematoma on its ear, another had an open sore on a leg, and another had two injured front legs. Peltier also observed cats at the location. Some of the cats had discharge from their noses and eyes. One bedroom appeared to house nothing but cats with mange.

Officer Peltier returned to 2623 Gardenia Avenue the next day and spoke with Kyrklund. Officer Peltier believed that Kyrklund claimed ownership of the animals. Kyrklund said that the animals were under the care of Noah's Ark Animal Rescue and that she was in charge of Noah's Ark. Officer Peltier pointed out the poor condition of the animals and issued two notices to comply. One notice concerned the health of the animals and directed Kyrklund to take the animals to a veterinarian for examination and possible treatment or to provide records that the animals had been to a veterinarian. The second notice concerned the number of animals on the property. Signal Hill limited the number of animals that could be held on a residential property to three dogs and five cats. Office Peltier believed the violations warranted the animals being impounded, but issued the notices to comply instead to give Kyrklund the opportunity to correct the violations.

Officer Peltier returned to Noah's Ark Animal Rescue in one week to determine if Kyrklund had complied with the notice to comply concerning the medical care of the animals. The conditions had not changed and those animals that exhibited symptoms of illness or injury were impounded. Officer Peltier returned to Noah's Ark Animal Rescue in two weeks to determine if Kyrklund had complied with the notice to comply

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2 Except as is necessary for context, we limit our discussion of the facts to those offenses of which either defendant was convicted.

concerning the number of animals held at the property. The number of animals had lessened, but did not meet the legal limit. No animals were impounded as a result.

On July 28, 2005, Long Beach Animal Control Lieutenant Michelle Quigley went to Noah's Ark, an animal rescue facility at 1333 Redondo Avenue. Defendants had relocated their rescue facility to that location and had invited Lieutenant Quigley to inspect their new location. Once inside Noah's Ark, Lieutenant Quigley smelled animal feces and urine. Defendants said that they had not finished cleaning that morning. Defendants also said that the facility was still under construction. Lieutenant Quigley expressed concern that animals were present while construction was ongoing. Defendants said they did not have a choice. Kyrklund said that she could not refuse when someone wanted to give her an animal. Lieutenant Quigley told Kyrklund that she had to refuse in the animals' best interest.

Lieutenant Quigley inspected Noah's Ark and observed cats that had runny eyes and were sneezing. Lieutenant Quigley told defendants that these cats had to be isolated immediately. Defendants said they would comply. Lieutenant Quigley observed volunteers who were not wearing gloves or smocks and told defendants that such apparel was necessary to avoid cross-contamination of the animals. Lieutenant Quigley told defendants that they needed to install a forced air system that would force air up and out of the facility and not allow air to re-circulate and contaminate other animals. Lieutenant Quigley also informed defendants that sanitation and health issues would be a "real challenge" without floor drains because all surfaces would have to be cleaned with mops and buckets. Defendants stated that they would implement Lieutenant Quigley's suggestions.

The parties stipulated that on August 10, 2006, Long Beach Animal Control Officer Kevin Estrada went to Noah's Ark for a lawful purpose. While in the lobby, Officer Estrada smelled a strong odor of feces and urine that caused his nostrils to burn and his eyes to water. Officer Estrada heard loud and continuous barking and saw dogs running loose in the lobby. Officer Estrada reported his findings to Lieutenant Quigley.

Based on those findings, Lieutenant Quigley concluded that an inspection was probably needed, but was not needed immediately.

About 11:30 a.m. on August 23, 2006, Long Beach Police Department Officer Karen Dougherty was dispatched to 1347 Redondo Avenue in the City of Long Beach to respond to a call of a robbery in progress. At the location was a warehouse with an attached brick structure. Officer Dougherty attempted to determine whether the property was a single address. Officer Dougherty noticed an open door and light on inside one of the two structures, the structure at 1333 Redondo Avenue—Noah's Ark. Officer Dougherty attempted to gather information about that structure from a woman in a car parked outside the open door. That woman told Officer Dougherty there were only dogs inside the building.

The door to Noah's Ark was open three to four inches. As Officer Dougherty approached the door, she smelled a "horrific odor" coming from the building. The ammonia-like odor smelled like urine and was "incredibly overwhelming." Officer Dougherty's eyes began to tear, and she became nauseated. Officer Dougherty could hear many dogs barking inside. When two men arrived and appeared to be entering Noah's Ark, Officer Dougherty poked her head inside and saw a business license on the wall. The odor inside the building was so bad that Officer Dougherty thought she would vomit.

Officer Dougherty radioed her communications division and asked an officer to research the location to identify a party responsible for the property. Officer Dougherty also asked that animal services be notified. Within about an hour, Lieutenant Quigley and other Long Beach Animal Control officers arrived. When Lieutenant Quigley arrived at Noah's Ark, she could smell the "pretty pungent" smell of animal waste from outside the building. Lieutenant Quigley spotted Ramos, who was standing outside of Noah's Ark. Lieutenant Quigley said to Ramos, "Gloria, this smells pretty bad." Ramos replied, "Yes, I know."

Long Beach Police Department officers attempted to determine if there was a current business license for Noah's Ark and the identity of Noah's Ark's owner or

proprietor. Lieutenant Quigley asked Ramos if there was a business license inside. Ramos said that it was on the lobby wall. Lieutenant Quigley entered Noah's Ark. The air inside was "thick" in the sense that it was burning and extremely foul and the temperature was very hot. Lieutenant Quigley "dry heaved." Lieutenant Quigley said to Ramos, "Gloria, this is really bad." Ramos said that she knew that.

Lieutenant Quigley asked Ramos if she could look at some of the animals to make sure that they were not being kept in conditions that were harmful to them. Ramos granted her permission. Lieutenant Quigley testified that she saw animals with runny and irritated eyes and skin conditions. Apparently some portion of the floor was covered in sawdust that was saturated with feces and urine. Other portions of the floor were slick with feces and urine.

Lieutenant Quigley testified that some of the dogs' beds in one area of Noah's Ark were damp with a substance that smelled like urine. Cats were housed in "extremely" dirty structures with no water. There were piles of feces on the "cat trees" on which the cats played, and litter boxes overflowed with piles of feces. The cats were thin and had swollen, runny eyes.

Lieutenant Quigley saw five or six mops and buckets in the facility. The liquid in the buckets was dark brown and had a "putrid" odor. There were flies in the brown liquid and flying in and around the buckets. Lieutenant Quigley testified that a bleach bath is used to stop the spread of certain diseases inside of shelters and kennels. Lieutenant Quigley did not see a bleach bath inside of Noah's Ark, although she did see some unopened bottles of bleach. Lieutenant Quigley testified that a grooming sink in the facility was dirty and was being used for storage. Likewise, a washer and dryer were used for storage. The physical effects on Lieutenant Quigley from having been inside Noah's Ark included a runny nose, irritated eyes, and nausea.

Lieutenant Quigley told Ramos that she needed to have a veterinarian technician inspect the conditions at Noah's Ark. Ramos agreed. Long Beach Animal Control Registered Veterinarian Technician Christine Culhno went to Noah's Ark. Lieutenant Quigley, Ramos, and Culhno entered Noah's Ark.

Culhno testified that inside Noah's Ark she saw dogs whose coats were soiled and matted with feces and urine. The dogs slid around on the floors, which were soiled with feces and wet with urine. Some of the dogs were emaciated, some had runny eyes, and other had runny noses. Culhno did not see any food for the dogs. Culhno saw water bowls, but could not remember if there was water in them.

It was very hot inside Noah's Ark. The air was stagnant and it was hard to breath. Culhno described the conditions inside Noah's Ark as nauseating. Culhno believed the conditions at Noah's Ark—the feces, urine, lack of ventilation, and crowding—were harmful to the animals. Culhno believed that the animals at Noah's Ark were in danger if they remained at that location. Culhno believed that the animals needed to be in a different environment to recover from their diseases or to prevent those diseases from becoming worse.

After Culhno inspected Noah's Ark, Lieutenant Quigley called Animal Control and requested that they contact a state licensed veterinarian. Animal Control provided Lieutenant Quigley with Dr. Selah's telephone number. Lieutenant Quigley and Culhno spoke with Dr. Selah. After that conversation a decision was made that the animals needed to be removed from Noah's Ark. Lieutenant Quigley contacted Animal Control and informed them that she needed "lots of help." When the help arrived, Lieutenant Quigley directed them to set up a triage area and command post in the back alley.

Officer Quigley spoke with Kyrklund by telephone and explained what was taking place at Noah's Ark. About an hour later, Kyrklund arrived at Noah's Ark. Lieutenant Quigley asked Kyrklund who was responsible for 1333 Redondo Avenue. Kyrklund raised her hand and said that she could be held responsible. Kyrklund was placed under arrest.

About 3:00 p.m. on August 23, 2006, Long Beach Animal Control Lieutenant Tonya Elliott responded to Noah's Ark. Lieutenant Elliott assisted in setting up a triage area. Lieutenant Elliott took a brief walk through the location. When she first entered the location, Lieutenant Elliott noted the air was stale and hot and there was not much air flow. The carpet just off the lobby was soaked in feces and urine and squished beneath

Lieutenant Elliott's feet. The cement floors were "very slippery" and appeared to be damp from urine. Lieutenant Elliott had to step around the animal waste.

Lieutenant Elliott testified that dogs were housed in wood structures that were unsanitary—there were feces and urine on the floors and walls. The dogs did not have fresh water or food.[3] A structure that housed cats also was unsanitary. The litter boxes were overflowing with feces. It appeared that there were insufficient litter boxes for the number of cats or that the boxes had not been cleaned for some time. Some cats had watery discharge coming from their eyes and noses and some cats were sneezing. Some of the cats appeared to be emaciated and ill.

Animal Control officers brought the animals out of Noah's Ark to the triage area where Culhno initially examined them. It took 13 hours to remove, catalog, and examine the 299 animals found at Noah's Ark. Culhno testified that about 40 of the dogs had discharge from their eyes, about 15 had open wounds, and some others had parasites. The majority of the dogs had redness to the skin, irritation, and hair loss. The dogs also had overgrown and discolored toenails. When the triage process was complete, the animals were sent to a shelter.

Culhno also testified about the condition of specific dogs, including dog number 150 that served as the basis for count 2 and dog number 152 that served as the basis for count 3. According to Culhno, dog number 150 was "really thin, emaciated." Dog number 150 had severe green discharge from its nose, discharge from its eyes, and a recent wire suture line on its abdomen that was matted with hair and feces and "horribly infected." Dog number 150 was matted in general, smelled really bad, was warm to the touch, and lethargic. That dog number 150 was warm to the touch indicated that it might have a fever. Dog number 150 was sent to a veterinarian immediately. Culhno believed that dog number 150 ultimately was euthanized. Culhno believed that the hot, humid,

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[3] Lieutenant Quigley testified that she saw some food and water for the animals, but the water was dirty.

and dirty environment and lack of proper medications caused dog number 150's condition.

Culhno testified that dog number 152 had a huge open oozing wound on the back of its neck. The wound was covered in flies. When the flies scattered, Culhno determined that the skin in the area of the wound was thickened, smelly, and bleeding. Dog number 152 also had clear discharge dripping from its eyes, generalized hair loss, and "really long" and discolored toenails. Dog number 152 was sent to a veterinarian due in part to the severity of its neck wound. Dog number 152 responded well to treatment.

Dr. Claudia Horvath, a veterinarian, treated dogs number 150 and 152. Dr. Horvath testified that dog number 150 was lethargic, sick, not eating, and breathing with difficulty when she first saw the dog. In Dr. Horvath's opinion, dog number 150 needed immediate medical intervention. Tests were run on dog number 150 and it was determined that it had a very low thyroid level and anemia. With treatment, dog number 150 improved somewhat and apparently was returned to a shelter. The dog later was brought back to Dr. Horvath with bloody vomiting and diarrhea and died that day.

Dr. Horvath testified that dog number 152 generally was in good health internally. The dog's external health, however, was "very poor." The dog had "severe" excoriation or crustiness on its back and whole trunk area. Dr. Horvath opined that dog number 152 had had the crustiness for some time. The dog's neck was crusty and had open crusty sore areas. The dog also had mites, bacteria, and yeast on its skin. Dr. Horvath testified that the dog's environment would not necessarily contribute to the crustiness.

On August 24, 2006, Dr. Irving Ameti, a relief veterinarian, assisted Long Beach Animal Control in evaluating animals and provided expert testimony. Dr. Ameti evaluated the animals at the Animal Control facility and did not go to Noah's Ark. Dr. Ameti testified that the dogs appeared sad and unkempt. The dogs' coats were dirty and some had matted hair. Several of the dogs had really red eyes which usually indicates an infection or an irritant in the eyes. Dr. Ameti prescribed medication for the dogs' eyes. Because the dogs' eyes cleared up quickly, Dr. Ameti concluded that an irritant in the dogs' environment and not an infection had been the cause of the red eyes.

Dr. Ameti testified that the main symptoms seen in the cats were eye discharge and red eyes. Some cats has nasal discharge and sounded congested. Many had dark discharge in their ears suggesting that the cats had ear mites. Dr. Ameti saw evidence of upper respiratory infection—a cold—in a number of the cats.

Dr. Ameti testified that an environment in which there is a lot of urine or fecal matter on the floor is dangerous to animals. When a large number of animals are kept together, the area should be cleaned and disinfected daily. Dr. Ameti testified that an environment that is hot without sufficient air circulation also could harm animals. Dr. Ameti also testified that animals that are sick should be isolated from other animals. Dr. Ameti explained that an environment that is concentrated with a high number of animals makes it easier to spread diseases among the animals.

The prosecutor asked Dr. Ameti to assume the following: "That 299 animals were being housed in a facility that was hot with little, if any, air circulation. The floors were covered with urine and fecal matter. The walls in some areas of the facility were covered in urine or fecal matter or mucous from animals sneezing. The coats of the animals were covered in urine or feces. There was little, if any, food in this environment. There was little, if any, water in this environment. Numerous cats were being housed in close proximity to dogs. Many of the animals were exhibiting nasal discharge, ocular discharge, conjunctivitis, upper respiratory infection, things of that nature." Given that set of assumptions, the prosecutor asked Dr. Ameti if such an environment was healthy for the animals. Dr. Ameti responded, "No."

On August 24, 2006, pursuant to a warrant, Lieutenant Quigley searched Noah's Ark. Lieutenant Quigley found a checkbook ledger for Noah's Ark that had a carbon copy of a check dated May 10, 2006, made payable to Ramos.

On August 29, 2006, Lieutenant Quigley went to Noah's Ark to continue her investigation. Lieutenant Quigley spoke with Ramos who was there. Lieutenant Quigley asked Ramos what she did at Noah's Ark. Ramos responded that she was there primarily to take care of the animals. Lieutenant Quigley asked Ramos how many people were

responsible for caring for the animals. Ramos responded that there were "only three of us here every day." Ramos stated that the number of animals became overwhelming.

Jeannine Montoya, a customer service supervisor for the City of Long Beach's Business License Department, processed business license applications. Montoya testified that there were two business license applications for 1333 Redondo Avenue. The first application was for a pet grooming business and was dated May 15, 2005. The second application was for a pet shop and was dated May 19, 2005. Both applications listed Noah's Ark as the business name, Gavin Sebits as the business owner, and Alexia Tiriaki as a principal officer or partner. In order to operate a kennel, an application for a kennel license would have to be applied for and granted. That was not done in this case.

In their defense, defendants called witnesses who testified about their observations as to the conditions at Noah's Ark. Crystal Toribio, Ramos's daughter, volunteered at Noah's Ark. Toribio cleaned from the time she entered the facility until the time she left. Toribio also bathed and groomed animals. During the time Toribio volunteered at Noah's Ark, her eye did not burn, sting, or tear. Toribio did not have trouble breathing, did not feel as though she had to vomit, and did not feel that the smell was so overwhelming that she could not stay inside.

According to Daniel Hubbard, a general contractor and volunteer at Noah's Ark, Noah's Ark had four or five portable air conditioning units and vents. Hubbard was in the process of installing an air conditioning unit, but had not completed it. Although it could be warm in Noah's Ark during the summer, Hubbard never had trouble breathing and he never experienced an overwhelming smell that made him want to vomit. Hubbard had been inside Noah's Ark numerous time and whenever he was there, people were cleaning continuously.

Scot Hicks adopted a dog from Noah's Ark in September 2005. Hicks did not recall that his eyes bothered him or that he had trouble breathing when he was inside the facility. Hicks also volunteered for Noah's Ark by transporting two animals from county facilities to Noah's Ark during the period from September 2005 to July 2006. The condition of those animals generally was poor.

Lori Chavera volunteered at Noah's Ark for about a year, usually working two days a week. Chavera spent her entire time at Noah's Ark cleaning, feeding the animals, and giving the animals water. Chavera's daughter also volunteered at Noah's Ark and cleaned the facility. Chavera and her daughter cleaned Noah's Ark on August 22, 2006. That day, the facility did not have a smell that made Chavera almost vomit. Chavera's eyes did not tear and she did not have trouble breathing. It was not hot inside Noah's Ark and the air was not stagnant. Chavera testified that while she was at Noah's Ark, Kyrklund usually took care of the dogs and Ramos did a lot of cleaning.

Linda Stone, an accountant and animal rescuer, was in charge of the feral cat program at California State University at Long Beach. Stone worked closely with Noah's Ark and considered it her "best ally." Kyrklund helped Stone by taking cats for Stone, socializing them, and putting them up for adoption. Stone saw animals that were brought to Noah's Ark apart from the animals she brought. Most of those animals were in poor health and had upper respiratory infections. According to Stone, Noah's Ark arranged for veterinarians to visit as often as possible. When animals were first brought to Noah's Ark, they were placed in quarantine for seven to 10 days.

Stone was at Noah's Ark on August 22, 2006, the day before Animal Control removed the animals. Stone testified that sometimes she experienced slight eye irritation while at Noah's Ark due to the bleach that was used at the facility. According to Stone, the facility was being cleaned constantly. Occasionally, the bleach also bothered Stone's breathing because she was an asthmatic. There was not an odor at Noah's Ark that caused Stone to be queasy or feel as if she had to vomit.

DISCUSSION[4]

I. Waiver Of Conflict-Free Counsel

Defendants contend that having the same counsel for both of them created a conflict of interest between them because (1) they had different roles with respect to Noah's Ark – Kyrklund was an owner and Ramos was an employee or volunteer; (2) Kyrklund was previously accused of criminal conduct with respect to the Signal Hill property and Ramos was not; and (3) Kyrklund had admitted culpability, having told Lieutenant Quigley that she could be held "responsible" for Noah's Ark. Thus, defendants contend, the trial court should not have permitted them to be represented by the same attorney. As a result of defense counsel's dual representation, defendants contend, they were denied their right to effective assistance of counsel. Ramos joins Kyrklund's argument. We hold that defendants knowingly and intelligently waived their right to conflict-free counsel.

A. Factual Background

At defendants' December 21, 2006, arraignment before Judge Gary J. Ferrari, defense counsel informed the trial court that he represented Kyrklund and Ramos. The trial court asked defense counsel if there was a conflict. Defense counsel responded that there was no conflict.

At a January 4, 2007, hearing before Judge Mark C. Kim, defense counsel informed the trial court that he represented both defendants. Defense counsel represented that there was no conflict. The trial court informed defense counsel that defendants would have to file a written conflict waiver form. The trial court then informed defendants that there could be a potential conflict between them in terms of their defense and that each had a right to be represented by her own attorney. Defendants stated that they understood. Given that understanding, the trial court asked each defendant if she

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[4] Kyrklund joins each of Ramos's argument on appeal to the extent that such arguments benefit her. Ramos joins certain of Kyrklund's arguments as noted below.

wanted to be represented by the same attorney. Kyrklund and Ramos responded affirmatively.

On January 31, 2007, Kyrklund and Ramos filed a "Waiver of Right to Conflict Free Counsel" in the trial court. That waiver states:

"1. We are the defendants in the above-entitled case.

"2. We understand that the following conflict of interest may exist with my [sic] counsel, TODD KRAUSS, that different defenses for each of us may exist, and that we each have a right to be represented by separate counsel.

"3. We have discussed this potential conflicts and the potential drawbacks of the potentially conflicted representation with our counsel and with outside counsel.

"4. We am [sic] aware of the dangers and possible consequences of this conflicted representation.

"5. We know we each have the right to representation by an attorney who is free of any conflict of interest or any potential conflict of interst [sic].

"6. We each voluntarily wish to waive our right to be represented by an attorney free of any potential or real conflict of interest and wish to continue to be represented by our present counsel, TODD KRAUSS."

At a hearing on February 7, 2007, Judge J.D. Lord asked defense counsel if he represented both defendants. Defense counsel responded that he did, and that there was a waiver in the file. On March 29, 2007, at the preliminary hearing, Judge Lord inquired of defense counsel if there had already been a waiver as to any potential conflict between defendants. Defense counsel responded, "There is a signed waiver in the file, your Honor."

On June 4, 2007, Judge Jesse I. Rodriguez, the trial judge in this case, held a hearing concerning defendants' conflict waiver at the prosecutor's request. Judge Rodriguez asked Kyrklund and Ramos if they had signed the waiver filed in the trial court on January 31, 2007. Defendants responded affirmatively. Judge Rodriguez then explained the potential for conflict whenever an attorney represents more than one defendant. Judge Rodriguez told defendants that co-defendants might have different

defenses depending on their perceptions of the relevant events. Also, co-defendants might have different levels of culpability that could subject them to different treatment by their attorney and by the prosecution. In negotiating a disposition to a case, Judge Rodriguez explained, the prosecution views defendants in the same case differently and disposes of their cases differently. Judge Rodriguez asked defendants if they understood, and they responded affirmatively.

Judge Rodriguez stated that it was "possible and very likely that in this case there is a built-in conflict between Miss Ramos and Miss Kyrklund vis-à-vis the participation, if any, of both of you." Defendants said they understood. Upon Judge Rodriguez's advisement, defendants also said they understood that they had a right to have a lawyer of their own choosing represent their interests at every stage of the proceedings.

Judge Rodriguez then advised defendants, "In terms of the conflict, furthermore, you not only have the court—the court does not only have the obligation to advise you of that, but you also have a right to obtain independent counsel irrespective of Mr. Krauss to advise you on your own separately of the liabilities that may be built-in or incurred as a result of several defendants represented by the same lawyer. You have a right to consult even for the purpose of this thing that we're doing here. You have a right to consult separate counsel so he or she can advise you of the possible conflict." Defendants stated that they understood. Judge Rodriguez asked defendants if they had any questions. Defendants said they did not.

Defense counsel told Judge Rodriguez that he and his clients had thoroughly reviewed and discussed the evidence and the conflict issue and that there was no conflict. Defense counsel stated, "Your Honor, you sat across my desk and basically told my clients what I told them. We have gone over that. I'm telling the court in no uncertain terms, not only in terms of your hypotheticals, not only in terms of what a witness may or may not do, not only in terms of trial theories and trial tactics and calling a witness and not calling a witness or whatever—we have had that discussion at numerous length. I can tell you unequivocally that as we sit here, there is no conflict."

Judge Rodriguez concluded by asking defendants if they understood everything he had said. Defendants stated that they understood, and that they had discussed and analyzed most of what he had said with defense counsel. Judge Rodriguez asked defendants if they had any questions of him or of defense counsel in private concerning the conflict of interest. Defendants said they had no questions, and the trial court again took defendants' oral waiver on the conflict issue.

B. Standard of Review

We review a trial court's ruling on a waiver of the right to conflict-free counsel for abuse of discretion. (*People v. Baylis* (2006) 139 Cal.App.4th 1054, 1067.)

C. Application of Relevant Legal Principles

Under the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant had a right to effective assistance of counsel. (*People v. Bonin* (1989) 47 Cal.3d 808, 833-834; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Included in the right to the effective assistance of counsel is 'a correlative right to representation that is free from conflicts of interest.' [Citations.]" (*People v. Bonin, supra,* 47 Cal.3d at p. 834; *Maxwell v. Superior Court, supra,* 30 Cal.3d at p. 619.)

Effective assistance is linked closely to representation by counsel of one's choice. (*Maxwell v. Superior Court, supra,* 45 Cal.4th at p. 613.) California decisions "limit severely the judge's discretion to intrude on defendant's choice of counsel in order to eliminate potential conflicts, ensure adequate representation, or serve judicial convenience." (*Ibid*.) "Defendant's confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible." (*Id.* at p. 615, fn. omitted.)

The right to conflict-free counsel may be waived. (*People v. Bonin, supra,* 47 Cal.3d at p. 837; *Holloway v. Arkansas* (1978) 435 U.S. 475, 483, fn. 5 ["a defendant

may waive his right to the assistance of an attorney unhindered by a conflict of interests"].) "To be valid, however, 'waivers of constitutional rights must, of course, be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences[,]" . . . [and] must be unambiguous and "without strings."' [Citations.] [¶] Before it accepts a waiver offered by a defendant, the trial court need not undertake any 'particular form of inquiry . . . , but, at a minimum, . . . must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.' [Citations.]" (*People v. Bonin, supra,* 47 Cal.3d at p. 837, quoting *People v. Mroczko* (1983) 35 Cal.3d 86, 110, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Before taking defendants' waiver of their right to conflict-free counsel, Judge Rodriguez conducted a proper inquiry. The record shows that Judge Rodriguez conducted an extensive hearing at which he advised defendants about the potential conflicts and drawbacks of potentially conflicted representation and obtained their knowing and intelligent waivers. (*People v. Bonin, supra*, 47 Cal.3d at p. 837; *People v. Mroczko, supra,* 35 Cal.3d at p. 110.) The record also shows that defendants discussed the potential conflicts and drawbacks of potentially conflicted representation with defense counsel and, significantly, with outside counsel. Accordingly, the trial court did not abuse its discretion in concluding that defendants waived their right to conflict-free counsel.

II. Kyrklund's Motion In Limine To Exclude Evidence Concerning The Signal Hill Property

Kyrklund contends that the trial court erred in denying her motion in limine to exclude evidence concerning the Signal Hill property pursuant to Evidence Code sections

1101, subdivision (b)[5] and 352[6]. The trial court did not abuse its discretion in admitting the evidence.

A. Factual Background

Defendants moved to exclude evidence concerning the Signal Hill property. The trial court denied the motion. Following Officer Peltier's testimony on direct examination concerning the condition in which Kyrklund maintained the animals at the Signal Hill property, as fully set forth above, the trial court gave the jury a "cautionary instruction." The trial court instructed the jury:

"Evidence has been introduced for the purpose of showing that the defendant Kyrklund committed a crime other than that for which she is on trial.

"This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that she has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

"1, The existence of an intent which is a necessary element of the crime charged;

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5 Evidence Code section 1101, subdivision (a) and (b) provide:

"(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

6 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"2, The identity of the person that committed the crime, if any, of which the defendant is accused;

"[3], The defendant had knowledge of the nature and conditions found at 1333 Redondo Avenue on August 23, 2006; and,

"4, The defendant had knowledge necessary for the commission of the crime charged.

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose."

B. Standard of Review

We review for abuse of discretion a trial court's ruling on the admission or exclusion of evidence under Evidence Code sections 1101 and 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

C. Application of Relevant Legal Principles

"Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 [27 Cal.Rptr.2d 646, 867 P.2d 757].)" (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or

self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.)

A determination that Evidence Code section 1101 does not mandate exclusion of uncharged crimes evidence does not end the inquiry; the admissibility of such evidence must also be reviewed under Evidence Code section 352. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' (*People v. Yu* (1983) 143 Cal.App.3d 358, 377 [191 Cal.Rptr. 859].)" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

The trial court instructed the jury that in order to prove Kyrklund violated section 597, subdivision (b), the prosecution had to prove that Kyrklund committed a grossly negligent act or omission. The trial court instructed the jury that "'Gross negligence' refers to negligent acts which are aggravated, reckless or flagrant and which are such a departure from the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for animal life or to constitute indifference to the consequences of those acts. The facts must be such that the consequences of the negligent acts could reasonably have been foreseen and it must appear that the danger to animal life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act."

Officer Peltier's testimony concerning the Signal Hill property was relevant to show that Kyrklund's conduct at 1333 Redondo Avenue was grossly negligent. Officer Peltier's testimony that Kyrklund previously had maintained animals in substandard conditions and that Long Beach Animal Control had informed her that such conditions

were substandard tended to show that Kyrklund's conduct at 1333 Redondo Avenue was aggravated, reckless, or flagrant. Kyrklund's knowledge of what constituted improper maintenance of animals also tended to show that the consequences of the manner in which Kyrklund maintained the animals at 1333 Redondo Avenue was reasonably foreseeable and that the danger to animal life was not the result of inattention, mistaken judgment, or misadventure. Accordingly, the evidence concerning the Signal Hill property was admissible under Evidence Code section 1101, subdivision (b), as showing knowledge and absence of mistake and thus the degree of negligence.

Evidence Code section 352 did not bar admission of the Signal Hill property evidence, for the evidence was not overly prejudicial and did not confuse the issues. The evidence was not prejudicial because it was substantially similar to the evidence adduced in support of the charged offenses and, as such, was not of a sort that would uniquely tend to evoke an emotional bias against Kyrklund. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 320; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405 [the potential for prejudice is decreased when the evidence of a defendant's uncharged acts was no stronger and no more inflammatory than the testimony concerning the charged offenses].) Contrary to Kyrklund's claim, a reasonable juror would not find confusing evidence that Long Beach Animal Control investigated similar circumstances at the Signal Hill property and at 1333 Redondo Avenue and that the circumstances at Signal Hill resulted in notices to comply followed by impoundment of the animals, whereas the circumstances at 1333 Redondo Avenue resulted in impoundment of the animals and criminal charges.

III. Exclusion Of Evidence That Long Beach Animal Control Was Killing Animals In Violation Of The Hayden Act

Kyrklund contends that the trial court violated her right to present a defense when it excluded evidence that would have supported the defense theories that Long Beach Animal Control was killing animals in violation of the Hayden Act (Civ. Code, § 1834.4) and that Long Beach Animal Control was biased against Kyrklund and Noah's Ark because Kyrklund threatened to expose such illegal killing to the press. Such evidence,

Kyrklund contends, would have shown the jury the "motive and bias behind the prosecution's case." Ramos joins Kyrklund's arguments and also contends that the trial court's exclusion of evidence that Long Beach Animal Control was euthanizing animals in violation of the Hayden Act violated her federal and state Constitutional rights to due process and to present a defense. Such evidence, Ramos contends, would have demonstrated Long Beach Animal Control's "bias and motivation to illegally pursue legal action against Noah's Ark and [defendants]" and would have served to impeach Long Beach Animal Control's witnesses. The trial court did not abuse its discretion in excluding as irrelevant the proffered evidence because it was offered in support of defendants' improper defense of selective and discriminatory prosecution.

A. Standard of Review

We review for abuse of discretion a trial court's ruling on relevance. (*People v. Cole, supra,* 33 Cal.4th at p. 1195.)

B. Application of Relevant Legal Principles

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Defendants contend that the proffered evidence was relevant to their defense of selective and discriminatory prosecution—that Long Beach Animal Control raided Noah's Ark, impounded the animals, and prosecuted defendants to keep them from disclosing Long Beach Animal Control's practice of euthanizing animals in violation of the Hayden Act. The evidence was not relevant, because selective and discriminatory prosecution is not a substantive defense to a criminal offense that may be tried to a jury.

"[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated

individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298 (*Murgia*), fn. omitted.)

"Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. (*Murgia, supra,* 15 Cal.3d at p. 293, fn. 4.) The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' (*Oyler v. Boles* (1962) 368 U.S. 448, 456 [7 L.Ed.2d 443, 446, 82 S.Ct. 501, 506].) When a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement. (*McLaughlin v. Florida* (1964) 379 U.S. 184, 193-196 [13 L.Ed.2d 222, 229-231, 85 S.Ct. 283, 289-91]; *Murgia, supra,* 15 Cal.3d at p. 304.)" (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831-832.)

The court in *Murgia v. Municipal Court, supra,* 15 Cal.3d 286 held that the issue of discriminatory prosecution is to be tried to the trial court and not to the jury. (*Id.* at pp. 293-294, fn. 4.) The court explained, "'The question of discriminatory prosecution relates not to the guilt or innocence of [the accused], but rather addresses itself to a constitutional defect in the initiation of the prosecution.' (*United States v. Berrigan* (3d Cir. 1973) 482 F.2d 171, 175.) As such, the claim 'should not . . . be tried before the jury . . . but should be treated as an application to the court for a dismissal or quashing of the prosecution upon constitutional grounds.' (*People v. Utica Daw's Drug Co.* (1962) 16 App.Div.2d 12 [225 N.Y.S.2d 128, 131].)" (*Ibid.*) The court also held claims of discriminatory prosecution should be brought in a pretrial motion. (*Ibid.*) The court explained, "because a claim of discriminatory prosecution generally rests upon evidence

completely extraneous to the specific facts of the charged offense, we believe the issue should not be resolved upon evidence submitted at trial, but instead should be raised . . . through a pretrial motion to dismiss." (*Ibid.*)

Because defendants' claim of selective and discriminatory prosecution was not a defense that could be tried to the jury, but instead should have been raised in a pretrial motion to dismiss to the trial court, the trial court did not abuse its discretion in excluding defendants' proffered evidence as irrelevant. (*Murgia, supra,* 15 Cal.3d at pp. 293-294, fn. 4.)

IV. Exclusion Of Certain Of Dr. Ameti's Testimony

During the cross-examination of Dr. Ameti, the relief veterinarian who was a prosecution expert and percipient witness, defense counsel asked Dr. Ameti about the information he would need to determine whether an act or omission caused danger to an animal's life and whether he could state to any degree of medical certainty that Kyrklund or Ramos caused any of the injuries or illnesses suffered by the animals that he diagnosed and treated. Defendants contend that the trial court abused its discretion when it sustained objections to these questions. We hold that any error in the exclusion of such evidence was harmless.

A. Standard of Review

We review for abuse of discretion a trial court's ruling on the admission or exclusion of expert testimony. (*People v. Watson* (2008) 43 Cal.4th 652, 692.) The erroneous exclusion of evidence warrants reversal only if it led to a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People v. Breverman* (1998) 19 Cal.4th 142, 173.)

B. Factual Background

During cross-examination of Dr. Ameti, the following colloquy took place:

"Q Isn't it further true, doctor, that without knowing the previous conditions of the animals, without knowing what kind of condition that they arrived in, whether or not they had been treated, whether or not they had ever been adopted out and returned, that you cannot state to any medical degree of certainty that Miss Kyrklund or Miss Ramos were the cause of any of the injuries that you alleged any of these animals had?

"[The Prosecutor]: Objection. Calls for a legal conclusion.

"The Court: Sustained.

[¶] . . . [¶]

"Q Doctor, what kind of information would you need to determine whether an act or omission caused danger to an animal's life?

"[The Prosecutor]: Objection. Calls for a conclusion. Relevance.

"The Court: Sustained.

"[Defense Counsel]: This establishes the doctor's opinion and what it is based upon, and which is one of the elements that is required by the People to prove.

"The Court: He is here to testify as to some form of scientific information, not to give a legal conclusion as to what was an omission or not.

"[Defense Counsel]: I'm asking what is the basis of the opinion, what is required. I'm not asking for the conclusion. I'm asking what is required to make the conclusion of any animal.

"The Court: Sustained as phrased.

"[By Defense Counsel]

"Q To determine if an animal is in danger, what information would you need when you examine that specific animal.

"[The Prosecutor]: Objection. Vague.

"The Court: Sustained.

"[Defense Counsel]: Your Honor. May counsel approach?

"The Court: No.

[¶] . . . [¶]

"[By Defense Counsel]

"Q Can you state to any degree of medical certainty, doctor, that Miss Kyrklund or Miss Ramos caused any of the illnesses that you diagnosed in any of the animals that you treated?

"A No.

"[The Prosecutor]: Objection. Calls for a legal conclusion.

"The Court: Sustained."

C. Application of Relevant Legal Principles

Evidence Code section 801 provides:

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

"(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

"(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.)

Even if the trial court erred in excluding Dr. Ameti's challenged testimony, any such error was harmless because it did not lead to a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People v. Breverman, supra*, 19 Cal.4th at p. 173.) Defendants were convicted of animal cruelty as to dogs number 150 (count 2) and 152

(count 3).[7] Dr. Horvath testified that she treated dogs number 150 and 152. Dr. Ameti did not testify that he treated dogs number 150 and 152. Instead, Dr. Ameti testified that he had no recollection of which animals he treated at Long Beach Animal Control. Because the evidence adduced at trial did not show that Dr. Ameti treated dog number 150 or dog number 152, even if Dr. Ameti had been permitted to testify that he could not state to any degree of medical certainty that Kyrklund or Ramos caused any of the injuries or illnesses that he diagnosed in any of the animals *that he treated*, any such testimony would not have "absolved" defendants as to dogs number 150 and 152. Moreover, defendants' convictions did not depend on defendants' responsibility for the injuries or illnesses actually suffered by dogs number 150 and 152. Under section 597, subdivision (b), defendants were guilty on counts 2 and 3 because the evidence showed that they "subject[ed] [the] animal[s] to needless suffering."

As for defendant's complaint that Dr. Ameti was not permitted to testify about the information that would have allowed him to determine whether an act or omission is dangerous to an animal's life, Dr. Ameti did testify that an environment in which there is a significant amount of urine or feces on the floor is dangerous to animals. Dr. Ameti further testified that an environment that is hot and does not have sufficient air circulation also could harm animals. Defendants do not explain how the absence of further testimony from Dr. Ameti on this subject prejudiced them. Moreover, the question as to what information Dr. Ameti may need in a vacuum does not appear to be capable of being answered in these circumstances.

V. Exclusion Of Certain Of Tom Swanner's Testimony

Kyrklund contends that the trial court erred in excluding testimony that would have shown an obstruction of justice by Long Beach Animal Control and the Long Beach City Attorney's Office in building a case against defendants. Such an obstruction of

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[7] We address only counts 2 and 3 because we hold below that defendants were improperly convicted on count 12 of animal cruelty to dogs number 1 through 152.

justice, defendants contend, would have supported defendants' defense that Long Beach Animal Control was biased against them. Ramos joins Kyrklund's argument. The trial court did not abuse its discretion in excluding the testimony.

The asserted factual basis for defendants' contention is as follows: "[T]he defense called Tom Swanner as a witness, who was the real estate agent that had rented the building to Noah's Ark. He was prepared to testify that [Long Beach Animal Control] and the Long Beach City Attorney's Office had contacted him in order to seek negative information about the defendants and then threatened him with reprisal if he did not do so. He declined and was prepared to so testify on the defendant's behalf." Defendants' rendition of the facts is not supported by the record.

That part of defense counsel's examination of Swanner that defendants cite provides as follows:

"Q Between April of 2005 and August 23rd of 2006, were you ever contacted by somebody from Long Beach Animal Control?

"A Yes.

"Q Who was that person?

"A I believe her last name is Quigley.

"Q What was the general purpose of why you were contacted? What is your understanding of why you were contacted?

"[The Prosecutor]: Objection. Calls for speculation and hearsay.

"The Court: Sustained.

"[By Defense Counsel]

"Q Do you know why you were contacted?

"[The Prosecutor]: Objection. Calls for speculation.

"The Court: Overruled.

"[By Defense Counsel]

"Q Sir?

"A My recollection is that she was expressing a general unhappiness with the tenants that we put in.

"Q Did she ever ask for any information?

"[The Prosecutor]: Objection. Relevance.

"The Court: Sustained.

"[Defense Counsel]: I can offer an offer of proof if I may approach, your Honor.

"The Court: Yes."

At side bar the following colloquy took place:

"[Defense counsel]: Okay. Your Honor, this witness is going to testify to the fact that he was contacted before August 23rd of 2006.

"The Court: When?

"[Defense Counsel]: He was contacted after immediately renting the property to Noah's Ark. [¶] Then he is also going to testify that after August 23rd, 2006, he was contacted by Cristyl Meyers on behalf of Long Beach Animal Control to submit a declaration against Noah's Ark and Miss Kyrklund. And none of that is in any of the records or ever identified at any time. He referred it off to an attorney.

"The Court: What's the relevancy?

"[Defense Counsel]: None of that information was ever provided to the defense. It is obstruction of justice. They contacted him to get information against my clients. He refused to do it. I can go into further detail. But none—that is exculpatory evidence to us. It was not mentioned in any of the reports that he was ever contacted after August 23rd.

"The Court: [Prosecutor.]

"[The Prosecutor]: I know absolutely nothing of this. I know that the City Attorney's Office has had dealings with the defendants on a civil matter and on a post-seizure hearing, business license revocation hearing. Any declarations that were asked for as part of that have absolutely nothing to do with this case.

"The Court: Sustained.

"[Defense Counsel]: Your Honor, I want to state for the record the declaration had nothing to do with these proceedings. It was for this proceeding that they were questioning him about. They wanted evidence regarding financial data.

"The Court: What is the relevance?

"[Defense Counsel]: It was not disclosed to us.

"The Court: What is the relevancy?

"[Defense Counsel]: It is obstruction of justice.

"The Court: Sustained."

Fairly read, the asserted obstruction of justice that defense counsel claimed in the trial court concerned the failure of the prosecution to provide evidence to the defense concerning conversations between Swanner and a representative of Long Beach Animal Control. There is no mention of threats of reprisal if Swanner did not provide negative information about Kyrklund. Defendants' failure to brief any contended discovery abuse in their opening briefs forfeits review of any such contention. (See *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 200, fn. 10 ["Ordinarily, an appellant's failure to raise an issue in its opening brief waives the issue on appeal"].)

Moreover, defendants' claim of bias against them by Long Beach Animal Control is part of their improper "defense" of selective and discriminatory prosecution. As discussed above, evidence in support of such a "defense" is not relevant because selective and discriminatory prosecution is not a substantive defense to a criminal offense that may be tried to a jury. (*Murgia, supra,* 15 Cal.3d at pp. 293-294, fn. 4.) Long Beach Animal Control initiated the investigation leading to the prosecution of defendants. So their "bias" against defendants was no secret to the jury.

VI. The Jury Instructions

Kyrklund contends that the trial court erred by refusing to instruct the jury with CALJIC No. 4.43 on the defense of necessity; by refusing to instruct the jury with CALJIC No. 2.51 on motive; and, if it was error to admit evidence concerning the Signal Hill property, by twice instructing the jury with CALJIC No. 2.50 on evidence of other crimes. Ramos also contends that the trial court erred in refusing a necessity instruction and joins Kyrklund's argument on the absence of a necessity instruction. The trial court properly instructed the jury.

A. CALJIC No. 4.43—Necessity

Defendants claim that a necessity instruction was proper because their acts were necessary to prevent Long Beach Animal Control from illegally euthanizing animals. The trial court properly refused the instruction.

CALJIC No. 4.43 provides:

"A person is not guilty of a crime when [he] [she] engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely: [¶] 1. The act charged as criminal was done to prevent a significant and imminent evil, namely, [a threat of bodily harm to oneself or another person] [or] [ ]; [¶] 2. There was no reasonable legal alternative to the commission of the act; [¶] 3. The reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided; [¶] 4. The defendant entertained a good-faith belief that [his] [her] act was necessary to prevent the greater harm; [¶] 5. That belief was objectively reasonable under all the circumstances; [and] [¶] 6. The defendant did not substantially contribute to the creation of the emergency[.] [; and [¶] 7. The defendant reported to the proper authorities immediately after attaining a position of safety from the peril.]"

Necessity is an affirmative defense. (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135.) "To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that she violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which she did not substantially contribute to the emergency. [Citations.]" (*Ibid.*)

The trial court properly refused to instruct on necessity because defendants failed to present evidence that showed (1) that they violated the law to prevent a significant and imminent evil and (2) that there was no reasonable legal alternative to the commission of their acts. As Kyrklund admits, no evidence was admitted at trial that showed that Long

Beach Animal Control was illegally euthanizing animals. As discussed above, the trial court properly ruled such evidence inadmissible. Defendants had not argued that the evidence should have been admitted to support a necessity defense. Even if defendants had produced sufficient evidence that Long Beach Animal Control was euthanizing animals illegally, defendants failed to present evidence that they had no reasonable legal alternative to violating section 597, subdivision (b) to prevent such conduct. Defendant had an obvious legal alternative—defendants could have maintained the animals they rescued in humane conditions. Moreover, defendants could have reported Long Beach Animal Control's alleged illegal activity to the authorities.

B. CALJIC No. 2.51—Motive

Defendants contend the trial court erred by not giving their requested instruction on motive. Defendants conceded that motive is not an element of the charged offenses, but argued that the jury should be able to consider a lack of motive. The prosecution argued that motive not a relevant concept when a defendant's culpability is based on negligence. The trial court agreed and refused the instruction.

CALJIC No. 2.51 provides:

"Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

Defendants contend that the motive instruction was critical to the jury's deliberations because Kyrklund "wanted to keep her animals from being euthanized, and kept alive." The trial court did not abuse its discretion in excluding such evidence concerning the conduct of Long Beach Animal Control. (See section III, *ante*.) Defendants had not sought the admission of such evidence in connection with motive. Thus, no evidence tending to prove defendants' point was adduced at trial. Defendants' contention in this regard is also an extension of its argument that the trial court should have instructed on necessity because Long Beach Animal Control was euthanizing

animals illegally. As discussed above, no admissible evidence supported such an instruction.

C. CALJIC No. 2.50—Evidence of Other Crimes

Defendants contend that if it was error to admit evidence concerning the Signal Hill property pursuant to Evidence Code section 1101, subdivision (b), then it was error for the trial court to twice instruct the jury with CALJIC No. 2.50 on evidence of other crimes. Because, as we held above, the trial court did not abuse its discretion in admitting the evidence concerning the Signal Hill property, the trial court properly instructed the jury on other crimes evidence.

VII. Defendants' Conviction On Count 12

Defendants were convicted of three counts of cruelty to an animal in violation of section 597, subdivision (b). Count 2 concerned dog number 150, count 3 concerned dog number 152, and count 12 concerned dogs number 1 through 152.[8] The trial court imposed sentence on counts 2 and 3 and stayed imposition of sentence on count 12 pursuant to section 654. Defendants contend that their convictions on count 12 must be reversed because they could be based on their conduct with respect to dogs number 150 and 152 thus causing them to suffer multiple convictions of the same statute for the same conduct. We agree.

In closing argument to the jury, the prosecutor stated that counts 1 through 11 concerned specific animals, while counts 12 and 13 covered all of the animals—count 12 covered all of the dogs and count 13 covered all of the cats. The prosecutor told the jury that "the defendants can be found guilty or not guilty of any or all of the counts. The fact that the animals are named in counts 1 through 11 does not mean that you cannot find the defendants guilty of cat 1 through 157 and dog 142 through 299 or however it is alleged."

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[8] Counts 1 through 9 concerned specific individual dogs. As discussed above, defendants were acquitted on counts 1, and 4 through 9.

Later, the prosecutor argued, "The evidence in this case established beyond a reasonable doubt that the defendants are both equally guilty of counts 1 through 13 as to the animals, the named animals in counts 1 through 11."

The trial court instructed the jury with CALJIC No. 17.01 as follows:

"The defendant is accused of having committed the crime of cruelty to an animal in Counts one through thirteen. The prosecution has introduced evidence for the purpose of showing that there is more than one act or omission upon which a conviction on Counts one through thirteen may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that she committed any one or more of the acts or omissions. However, in order to return a verdict of guilty to Count one through thirteen, all jurors must agree that she committed the same act or omission or acts or omissions. It is not necessary that the particular act or omission agreed upon be stated in your verdict."

The verdict form for Kyrklund for count 12 states:

"We, the Jury in the above-entitled action, find the Defendant, ALEXIA S. KYRKLUND, GUILTY of the crime of CRUELTY TO ANY ANIMAL, to wit, Noah's Ark dogs #1 through #152, in violation f Penal Code section 597(b), a Felony, as charged in Count 12 of the Information." But for the identity of the defendant, Ramos's verdict form for count 12 was identical to Kyrklund's verdict form.

A "defendant may not be subjected to multiple convictions based upon a single, indivisible act or omission in violation of a single statute." (*People v. Gardner* (1979) 90 Cal.App.3d 42, 47-48, italics omitted; see also *People v. Lewis* (1978) 77 Cal.App.3d 455, 461 ["a defendant may not be subjected to multiple convictions for only one criminal act"].) As count 12 (dogs number 1 through 152) was alleged, once the jury found defendants guilty on count 2 (dog number 150) and count 3 (dog number 152), defendants automatically were guilty on count 12. This outcome impermissibly subjected defendants to "multiple convictions based upon a single, indivisible act or omission in violation of a single statute." (*People v. Gardner, supra,* 90 Cal.App.3d 47-48; *People v. Lewis, supra,* 77 Cal.App.3d at p. 461.)

In theory, defendants' conviction on count 12 could have been based on a dog other than a dog alleged in counts 1 through 9. One cannot tell from the verdicts, however, which dog or dogs served as the basis for the jury's guilty verdict on count 12. Neither the prosecutor's closing argument nor the trial court's instructions told the jury that the defendants' conviction on count 12 had to rest on a dog other than those identified in counts 1 through 9. To the contrary, the prosecutor's closing argument and CALJIC No. 17.01, as given, invited the jury to base a conviction on count 12 on the dogs alleged in counts 1 through 9.

Respondent contends that the trial court properly sentenced defendants under section 654, subdivision (a). Section 654, subdivision (a) provides in part that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 concerns multiple punishments when a single act violates more than one Penal Code section. The issue presented here is whether a single act can result in multiple convictions under the same Penal Code section. We hold that it cannot. Accordingly, defendants' convictions on count 12 are reversed.

VIII. Sufficiency Of The Evidence On Counts 2 And 3

Defendants contend that there is insufficient evidence to support their convictions on counts 2, 3, and 12. Above, we held the defendants impermissibly were convicted on count 12. Sufficient evidence supports defendants' convictions on counts 2 and 3.

A. Standard of Review

"'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson*

v. Virginia (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) We apply an identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].)" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

B. Application of Relevant Legal Principles

Subdivision (b) of section 597 provides,

"Except as otherwise provided in subdivision (a) or (c), every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty thousand dollars ($20,000)."

Animal cruelty is not a specific intent crime. (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1186-1187.) A conviction may be based on criminal negligence. (See *People v. Speegle* (1997) 53 Cal.App.4th 1405, 1413, 1415 [approving an instruction on gross negligence for an alleged violation of section 597, subdivision (b)]; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 20, p. 225.)

The trial court instructed the jury on animal cruelty with instruction "User A" as follows:

"Defendant is charged in Counts 1 through 13 of the information with Cruelty to An Animal, in violation of Penal Code section 597(b), a felony.

"Every person who causes an animal to be deprived of necessary sustenance, drink or shelter, or, who, having care or custody of an animal, subjects any animal to needless suffering, or fails to provide the animal with proper food, drink, or shelter, in a grossly negligent manner, is guilty of cruelty to an animal.

"The word 'animal' includes every dumb creature. The word 'cruelty' includes every act, omission, or neglect whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted.

"Deprivation of necessary sustenance, drink or shelter is unlawful when a person commits an act or omission inherently dangerous to animal life or safety or which would inherently produce danger to an animal's life.

"Subjecting an animal to needless suffering and failure to provide an animal with proper food, drink, or shelter or protection are both unlawful when a person commits an act or omission which would inherently produce danger to an animal's life.

"In order to prove this crime, each of the following elements must be proved:

"(1) That a person had custody or was responsible for providing care to an animal;

"(2) The person committed a grossly negligent act or omission; and

"(3) That act or omission caused danger to an animal's life."

The trial court instructed the jury with CALJIC No. 3.36 on gross negligence as follows:

"'Gross negligence' means conduct which is more than ordinary negligence. Ordinary negligence is the failure to exercise ordinary or reasonable care.

"'Gross negligence' refers to negligent acts which are aggravated, reckless or flagrant and which are such a departure from the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for animal life

or to constitute indifference to the consequences of those acts. The facts must be such that the consequences of the negligent acts could reasonably have been foreseen and it must appear that the danger to animal life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act."

Kyrklund contends that there is not substantial evidence that she herself committed grossly negligent acts or omissions against the animals, that any acts or omissions on her part actually caused danger to the animals, or that the animals did not have the injuries or illnesses when they were first brought to Noah's Ark. In support of her contention that the prosecution failed to show that she personally was grossly negligent, Kyrklund argues that prosecution failed to show that Gavin Sebits, who was on the business license with Kyrklund, did not have custody of or responsibility for the animals. In support of her contention that the prosecution failed to show that her actions caused harm to the animals, Kyrklund argues that the trial court erred in sustaining an objection to Dr. Ameti's testimony that he could not say to a medical certainty that Noah's Ark caused the injuries he treated.[9] In support of her contention that the prosecution failed to show the condition of the animals when they arrived at Noah's Ark, Kyrklund asserts that Stone testified "that most of the animals that Noah's Ark rescued were the most hopeless cases, already in poor medical condition." Ramos joins Kyrklund's contentions and also contends that the prosecution failed to show her role in operating Noah's Ark.

That Sebits also may have had custody of or responsibility for the animals at Noah's Ark does not absolve defendants of their culpability. Moreover, on cross-examination, defense counsel elicited testimony from Lieutenant Quigley that she had previously testified that she had not attempted to contact Sebits because Kyrklund and

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[9] Above, we held that the trial court's limitation of Dr. Ameti's testimony was not prejudicial.

Ramos told her that Sebits was out of town and no longer participating in the daily operations of Noah's Ark.

As to the argument that responsibility for the condition of dogs number 150 and 152 cannot be assigned to defendants because the prosecution failed to show the condition of these dogs when they arrived at Noah's Ark, Culhno's testimony constituted evidence of defendants' responsibility for the dogs' condition. Culhno testified that dog number 150 was emaciated, had severe green discharge from its nose, and discharge from its eyes. Dog number 150 had a recent wire suture line on its abdomen that was matted with hair and feces and "horribly infected." Culhno believed that the hot, humid, and dirty environment and lack of proper medications caused dog number 150's condition. Culhno testified that dog number 152 had a huge open oozing wound on the back of its neck. The skin in the area of the wound was thickened, smelly, and bleeding. Dog number 152 also had clear discharge dripping from its eyes, generalized hair loss, and "really long" and discolored toenails. After dog number 152 was removed from Noah's Ark and sent to a veterinarian, it responded well to treatment.

As for defendants' argument that evidence was not presented as to the animals' condition when they arrived at Noah's Ark, the evidence was such that a reasonable juror could conclude that the poor conditions at Noah's Ark caused or contributed to the condition of dogs number 150 and 152. Culhno's testimony supports such a conclusion. Independent of the animals' condition when they arrived at Noah's Ark, defendants were guilty under section 597, subdivision (b) because the evidence showed that they "subject[ed] [the] animal[s] to needless suffering." The condition of the dogs is just some of the evidence of the conditions to which there were being subjected.

Ramos contends that the evidence showed that she did not own Noah's Ark and was only a volunteer. One does not escape culpability under section 597, subdivision (b) by virtue of caring for an animal as a volunteer. Subdivision (b) assigns culpability for cruelty to animals to those who have "the charge or custody of any animal, either as owner *or otherwise* . . . ." (Italics added.) Lieutenant Quigley testified that Ramos told her that she was at Noah's Ark primarily to take care of the animals and that she and two

others were at Noah's Ark every day. Such testimony was sufficient to establish Ramos's responsibility for dogs number 150 and 152.

IX. Effective Assistance Of Defense Counsel

Kyrklund contends that defense counsel's assistance was prejudicially deficient because defense counsel represented Kyrklund and Ramos despite a conflict, failed to make a motion to dismiss on the ground of selective and discriminatory prosecution, and failed to "take the mistrial for prosecution discovery abuse." Ramos contends that defense counsel was ineffective in his dual representation of her and Kyrklund, for failing to move to dismiss on the ground of selective and discriminatory prosecution, and for failing to raise a double jeopardy argument in connection with her conviction on count 12. We addressed the ineffective assistance claim in connection with the dual representation of Kyrklund and Ramos above. Because we held that defendants' conviction on count 12 was improper, we need not consider Ramos's ineffective assistance claim with respect to that count. With respect to defendants' remaining contentions, defendants fail to demonstrate ineffective assistance of counsel.

"'Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]" (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) "Generally, . . . prejudice must be affirmatively proved. [Citation.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance

claim fails. (*People v. Foster, supra,* 111 Cal.App.4th at p. 383.) "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson, supra,* 25 Cal.4th at p. 569.)

We need not determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697.)

A. Motion to Dismiss Pursuant to Murgia v. Municipal Court

In response to defense counsel's argument that the trial court should permit the defense to introduce evidence that Long Beach Animal Control was killing animals in violation of the Hayden Act, the trial court stated, "This is almost like a Munghia [sic] motion, some kind of selective prosecution." Defense counsel responded, "That's been our contention all along." The trial court stated, "You haven't made the motion." Defense counsel stated, "Your Honor, in terms of—my first problem is I first need Lieutenant Quigley to admit or deny it. If she admits it, it is not an issue." The trial court excluded the evidence.

We need not decide whether defense counsel's performance was deficient in failing to file a motion to dismiss under *Murgia v. Municipal Court, supra,* 15 Cal.3d 286 because defendants have failed to prove prejudice. Although defense counsel made an offer of proof concerning Long Beach Animal Control's alleged violations of the Hayden Act, the record on appeal does not set forth precisely the proposed defense evidence. Thus, we are unable to determine whether such evidence was competent and admissible in a hearing on a motion to dismiss. Also, because defense counsel did not file a motion to dismiss, the prosecution did not have an opportunity to try to establish a compelling

reason for any selective prosecution of defendants. (See *Baluyut v. Superior Court, supra,* 12 Cal.4th at pp. 831-832.) Accordingly, defendants have failed to show a reasonable probability that a motion to dismiss would have succeeded on this record. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) Defendants' claim in this regard is more suited to a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

B. Mistrial for Prosecutorial Discovery Abuse

Kyrklund contends that defense counsel's performance was ineffective because, when it became apparent that the prosecution had failed to provide full discovery, and the trial court "offered" defendants a mistrial, defense counsel declined the mistrial and also rejected a continuance to review the evidence. The record does not disclose such ineffective assistance in this connection.

The record shows that the prosecution failed to provide full discovery to the defense concerning medical records for the impounded animals. The trial court found that the missing discovery concerned events after the date of the alleged violations and concerned the ongoing treatment of the animals. The trial court agreed with defense counsel that one document had been changed.

Defense counsel moved to dismiss the case, asserting a violation of section 1054 (discovery in criminal cases) and *Brady v. Maryland* (1963) 373 U.S. 83, 87 (the prosecution has a duty to disclose evidence material to guilt or punishment). The prosecutor responded that the failure to disclose the records at issue did not constitute a *Brady* violation because the records were not exculpatory. The prosecutor admitted, however, that the failure to disclose the records was a violation of section 1054. The prosecutor suggested that the proper remedy would be to advise the jury about the prosecution's failure of discovery.

The trial court found a violation of section 1054, but no violation of *Brady v. Maryland, supra,* 373 U.S. 83. The trial court stated to defense counsel that as remedies for the violation it would consider a continuance, a motion for a mistrial, and an

advisement to the jury about late discovery. Defense counsel suggested that as an additional remedy, certain testimony could be stricken. The prosecutor pointed out that under subdivision (c) of section 1054.5, witness testimony can be prohibited only when all other sanctions have been exhausted. The prosecutor restated his belief that an instruction and advisement to the jury about "what had happened" was the proper remedy. The prosecutor also expressed his willingness to allow defense counsel "substantial leeway" in closing argument concerning the discovery violation.

The trial court gave defense counsel time to speak with defendants about the issue. After a brief recess, defense counsel represented to the trial court that he had spoken with defendants. Defense counsel stated that the defense did not want a continuance. Instead, the defense wanted the trial court to instruct the jury concerning the discovery violation and to allow defense counsel "latitude" in closing argument concerning the discovery violation.

The trial court then addressed defendants, asking them if they had had the opportunity to discuss the discovery issue with defense counsel. Both defendants stated that they had. The trial court asked defendants if they agreed with defense counsel that they did not want a continuance, did not request a mistrial, and requested a cautionary instruction. Both defendants agreed.

There is a strong presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance and we give great deference to defense counsel's reasonable tactical decisions. (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.) "'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*Ibid.*) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*Ibid.*)

The record demonstrates that defense counsel, after consulting with defendants, made a tactical decision to request an instruction to the jury concerning the prosecution's

discovery violation and "latitude" in closing argument concerning the issue rather than to request a mistrial or continuance. The record does not reveal the basis for that decision. Defendants do not contend that there could be no conceivable reason for defense counsel's decision. Indeed, given the apparent insignificant nature of the discovery violation—the failure to turn over updated medical records—defense counsel reasonably may have decided that a jury instruction and "latitude" in closing argument were more advantageous than a continuance or mistrial. Accordingly, we find no ineffective assistance of counsel. (*People v. Weaver, supra,* 26 Cal.4th at pp. 925-926.) Again, however, issues of ineffective assistance of counsel are more appropriately raised by way of a habeas corpus petition. (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 267.)

X. The Restitution Award

Defendants contend that the trial court's restitution award of $94,614.12 was an abuse of discretion because the restitution award concerned all animals removed from Noah's Ark, yet they were convicted of cruelty as to two dogs only—dogs number 150 and 152; there was insufficient documentary evidence to support the restitution award; and Long Beach Animal Control failed to mitigate its damages. Ramos joins Kyrklund's arguments and also contends that joint and several liability is inappropriate. We disagree.

A. Standard of Review

"'"The standard of review of a restitution order is abuse of discretion. 'A victim's restitution right is to be broadly and liberally construed.' [Citation.] '"When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court."' [Citations.]" [Citation.]' (*People v. Baker* (2005) 126 Cal.App.4th 463, 467 [23 Cal.Rptr.3d 871].) 'In reviewing the sufficiency of the evidence, the "'power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the trial court's findings." [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a

reasonable doubt. [Citation.] "If the circumstances reasonably justify the [trial court's] findings," the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citation.]' (*Id.* at pp. 468-469.)" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 686.)

B. Application of Relevant Legal Principles

Section 597, subdivision (f)(1) provides, "Upon the conviction of a person charged with a violation of this section by causing or permitting an act of cruelty, as defined in Section 599b, all animals lawfully seized and impounded with respect to the violation by a peace officer, officer of a humane society, or officer of a pound or animal regulation department of a public agency shall be adjudged by the court to be forfeited and shall thereupon be awarded to the impounding officer for proper disposition. A person convicted of a violation of this section by causing or permitting an act of cruelty, as defined in Section 599b, shall be liable to the impounding officer for all costs of impoundment from the time of seizure to the time of proper disposition."

1. Costs of impoundment for all animals seized

Defendants contend that because they were convicted of cruelty as to two dogs only—dogs number 150 and 152—and not the 299 animals that were seized from Noah's Ark, they should be responsible for the costs of impoundment only for those two dogs. That contention was rejected in *People v. Speegle, supra,* 53 Cal.App.4th 1405.

In *People v. Speegle, supra,* 53 Cal.App.4th 1405, animal control officers seized 204 animals from the defendant. (*Id.* at p. 1409.) A jury convicted the defendant of eight counts of felony animal cruelty (§ 597, subd. (b)) and one count of misdemeanor (animal neglect (§ 597f, subd. (a)). (*People v. Speegle, supra,* 53 Cal.App.4th at p. 1409.) Following a hearing, the trial court ordered the defendant to reimburse the cost of

impounding the animals in the amount of $265,000 pursuant to section 597, subdivision (f). (*Ibid.*)

On appeal, the defendant argued that her reimbursement obligation for the cost of impoundment under subdivision (f) of section 597 should have been limited to the eight animals that served as the basis for her eight felony convictions and should not have included all of the impounded animals. (*People v. Speegle*, *supra*, 53 Cal.App.4th at p. 1417.) Rejecting the defendant's argument, the Court of Appeal held that under subdivision (f) of section 597, "an impoundment officer may recover costs for animals other than the direct victims of a defendant's violation of the statute." (*People v. Speegle, supra,* 53 Cal.App.4th at p. 1418.) We choose not to depart from *People v. Speegle* in this case.

2. Sufficiency of the evidence supporting the restitution award

Defendants contend that insufficient evidence supports the restitution award of $94,614.12 because Long Beach Animal Control did not present documentary evidence in the form of checks or invoices to support its claim and the evidence of expenditures was not linked to specific animals. Sufficient evidence supports the award.

At the restitution hearing, Lieutenant Quigley testified about Long Beach Animal Control's calculation of its impoundment costs. The calculation was set forth in the prosecution's supplemental sentencing memorandum which attached invoices for hospital and veterinarian care and medication and medical supplies. The $94,614.12 reimbursement claim was calculated as follows: $7,475 in impound fees (299 animals x $25 per animal (the Long Beach City Council set the per animal impoundment fee)); $11,396.58 in hospitalization and veterinarian fees; $65,632 in board and keep fees (293 animals (some animals died or were euthanized) x 28 days x $8 per day (the Long Beach City Council set the daily per animal board and keep fee)); $10,110.54 in medication and medical supplies. Lieutenant Quigley testified that she examined the invoices. The prosecution's supplemental sentencing memorandum and Lieutenant Quigley's testimony met the preponderance of the evidence standard of proof that applied at the restitution

hearing and constituted substantial evidence to support the finding. (*People v. Prosser, supra,* 157 Cal.App.4th at p. 686.) Defendants do not cite any authority for their contentions that Long Beach Animal Control's reimbursement claim had to be supported by documentary evidence in the form of checks or invoices or that it had to link specific expenditures to specific animals.

3. Mitigation

Defendants claim that the evidence at the restitution hearing showed that Long Beach Animal Control failed to mitigate its damages. Defendants claim that Lieutenant Quigley's testimony showed that Long Beach Animal Control turned down an offer by the general manager of Los Angeles City Animal Services to house and care for all of the animals, refused to allow animals to be adopted, refused an offer of free veterinary care by a Dr. Saleh, and received adoption and neutering fees for animals that it did not offset against its restitution claim. Defendants overstate Lieutenant Quigley's testimony.

Lieutenant Quigley's testimony was somewhat unclear. Lieutenant Quigley testified that Long Beach Animal Control was not a public adoption agency and did not collect adoption fees. Lieutenant Quigley then explained that some of the animals were adopted through Internal Revenue Code section 501(c)(3) (26 U.S.C. § 501(c)(3)) nonprofit rescue groups and the Society for the Prevention of Cruelty to Animals (SPCA). For animals adopted through nonprofits after October 5, when the animals became city property, Long Beach Animal Control received a $10 adoption fee and a $50 spay or neutering fee. Lieutenant Quigley did not know how many animals were adopted through nonprofits, explaining that many were adopted through the SPCA. Lieutenant Quigley testified that the SPCA received an adoption fee of about $125. Long Beach Animal Control did not receive a fee for animals adopted through the SPCA.

When the animals were first seized, persons inquired about adopting them. Those persons were told that they could not adopt the animals. Lieutenant Quigley testified that she was aware that Ed Box, general manager of Animal Services for the City of Los Angeles, signed a declaration stating that he would take all of the animals and care for

and treat them free of charge and that Dr. Saleh had signed a declaration that he would care for the animals that were seized free of charge. Lieutenant Quigley explained, however, that the seized animals could not be released to others because they were evidence of a crime, and, as the seizing agency, Long Beach Animal Control was responsible for maintaining and caring for the animals until a final disposition in a criminal case.[10]

In challenging Long Beach Animal Control's restitution claim in the trial court, defendants argued that Long Beach Animal Control failed to mitigate its damages. Implicit in the trial court's award of $94,614.12 in reimbursement for the cost of impound is a rejection of defendants' mitigation argument. Even if Lieutenant Quigley's testimony can be construed as supporting a finding that Long Beach Animal Control failed to mitigate its damages, it also supports the finding that Long Beach Animal Control did not have the opportunity to mitigate its damages. Presented with two such possible interpretations of the evidence, we are not in a position to substitute our judgment for that of the trial court. (*People v. Prosser*, *supra*, 157 Cal.App.4th at p. 686 ["'If the circumstances reasonably justify the [trial court's] findings," the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citation.]' [Citation.].)"

4. Joint and several liability

In *People v. Hernandez* (1991) 226 Cal.App.3d 1374, the sole case on which Ramos relies, the Court of Appeal held that joint and several liability is inappropriate for restitution orders. (*Id.* at pp. 1379-1380.) In *People v. Zito* (1992) 8 Cal.App.4th 736,

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[10] This testimony is at odds with Lieutenant Quigley's other testimony that many of the animals had been adopted. Because the criminal case had not concluded at the time of her testimony at the restitution hearing, Long Beach Animal Control had not maintained and cared for all the animals until a final disposition in the criminal case.

the Court of Appeal soundly criticized the holding in *People v. Hernandez*. We agree with the reasoning and holding in *People v. Zito*. (*Id.* at pp. 743-746.) The prevailing view among Courts of Appeal permits joint and several liability for restitution awards. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535; *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1051, & fn. 6 [noting that the invalidated joint and several liability restitution award in its previous opinion in *People v. Hernandez* was part of a grant of probation and not pursuant to a specific statute]; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1099 [distinguishing its prior decision in *People v. Hernandez* on the ground that the joint and several liability imposed for a restitution award was part of a grant of probation]; *People v. Flores* (1961) 197 Cal.App.2d 611, 616.)

DISPOSITION

Defendants' conviction on count 12 is reversed. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.